

**IN THE  
SUPREME COURT OF MISSOURI**

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**SC92653**

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**GINA BREITENFELD, *et al.*,  
Plaintiff/Appellant**

**v.**

**SCHOOL DISTRICT OF CLAYTON, *et al.*,  
Defendants/Respondents.**

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**Appeal from the Circuit Court of Saint Louis County, Missouri  
21st Judicial Circuit  
Case No. 12SL-CC00411**

**The Honorable David Lee Vincent, III, Circuit Court Judge Presiding**

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**BRIEF OF *AMICI CURIAE*  
SHAWN RYAN, TIFFARNISH LEWIS, AND TONY ALEXANDER**

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## **JURISDICTIONAL STATEMENT**

*Amici Curiae* hereby adopt and incorporate by this reference the jurisdictional statements set forth in the briefs to this Court filed by Appellants Gina Breitenfeld, and by the State of Missouri and Attorney General Chris Koster.

## **STATEMENT OF FACTS**

*Amici Curiae* hereby adopt and incorporate by this reference the facts recited and set forth in the briefs to this Court filed by Appellants Gina Breitenfeld, and by the State of Missouri and Attorney General Chris Koster.

## **STATEMENT OF INTEREST OF AMICI CURIAE**

### **Shawn Ryan**

*Amicus curiae* Shawn Ryan (“Ryan”) is a resident of the City of St. Louis and is the parent of Sophie (twelve) a school-aged child eligible for enrollment in the St. Louis Public School District (the “SLPSD” or the “District”). Ryan works as a firefighter for the St. Louis Fire Department (the “SLFD”) and therefore, is currently barred by law from living outside the political boundaries of the City.

Although Ryan is a proponent of the public school system, he will not enroll his daughter in the SLPSD because he does not believe she will receive an adequate education in a district that fails to meet the State’s most basic standards for accreditation as set by the Missouri Department of Elementary and Secondary Education (“DESE”). Therefore, Ryan pays tuition to send his daughter to St. Gabriel the Archangel Catholic School, where she is in the seventh grade.

Ryan wants to send Sophie to receive a free education at an accredited school in St. Louis County as provided in section 167.131. He has researched the public school districts in Clayton, Kirkwood, Webster Groves, and Lindbergh. If given the opportunity, Ryan would enroll his daughter in the Lindbergh school district because it offers a proven academic track record and is reasonably close to his home.

Ryan currently drives his daughter to her Catholic school and would continue that practice if permitted to enroll her in an accredited public school in St. Louis County.

**Tiffarnish Lewis**

*Amicus curiae* Tiffarnish Lewis (“Lewis”) is a resident of the City of St. Louis and is the parent of Marques (seventeen), Taeyanna (fifteen), Nadeya (twelve), Falyn (eleven), and Terrell (eight), all of whom are school-aged children eligible for enrollment in the SLPSD. Lewis works in the financial reporting section of the St. Louis Comptroller’s Office and therefore, is currently barred by law from living outside the political boundaries of the City.

Lewis would like her children to attend college one day but worries whether the SLPSD will adequately prepare them for a college curriculum. She is particularly apprehensive given the District’s current failure to maintain its accreditation from DESE and fears her children will be stigmatized for having attended a system that fails to meet even the most basic requirements set by the State.

Lewis lacks faith in the SLPSD, so at one point or another, all her children have been enrolled in private schools. Currently, Lewis pays tuition to send Nadeya and Falyn

to Marian Middle School, where they are enrolled in the seventh and sixth grades, respectively. Unfortunately, Lewis cannot send all her children to private school. Therefore, Marques, Taeyanna, and Terrell are all presently enrolled in SLPSD schools. Marques attends Gateway High School and is in the eleventh grade; Taeyanna attends Central Visual and Performing Arts High School and is in the ninth grade; and Terrell attends Mallinckrodt Elementary School and is in the third grade.

Lewis wants all her children to receive a free education in accredited schools in St. Louis County as provided in section 167.131. If given the opportunity, Lewis would consider enrolling her children in the Rockwood or Ladue school districts in St. Louis County. Lewis knows other families whose children attend school in Rockwood and Ladue, and Lewis believes both districts have good academic reputations.

**Tony Alexander**

*Amicus curiae* Tony Alexander (“Alexander”) is a resident of the City of St. Louis, and is the parent of Bryan (eight), a school-aged child eligible for enrollment in the SLPSD. Alexander works as a firefighter for the SLFD, and therefore, is currently barred by law from living outside the political boundaries of the City.

Alexander refuses to enroll his son in the SLPSD because the District is unaccredited and does not offer a safe environment. Therefore, Alexander pays tuition to send his son to Green Park Lutheran School in St. Louis County, where he is in the third grade.

Alexander wants to send Bryan to receive a free education at an accredited school in St. Louis County as provided in Section 167.131. He has researched the various public school districts, and if given the opportunity, would enroll his son in the Webster Groves school district because it offers a good education reasonably close to Alexander's home, and because the district offers an affordable after-school program.

Alexander or his wife currently drive his son to school, and would continue that practice if permitted to enroll him in an accredited public school in St. Louis County.

### **ARGUMENT**

The issues before this Court go to the heart of the State's most basic commitments to its citizens, and particularly to its children. Missouri has long recognized the fundamental importance of public education. The State's responsibility to educate its young people is enshrined in article IX, section 1(a) of the Missouri Constitution, which provides that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law." Mo. Const. art. IX § 1(a). Missouri devotes twenty-five percent of its budget to public education, and each school district receives State funding according to a formula set by the General Assembly. Mo. Const. art. IX § 3(b); R.S.Mo. § 163.031.

The SLPSD is the second largest public school district in the State and one of the most expensive districts in the St. Louis metropolitan area on a per-pupil basis.

Nevertheless, its schools are an abysmal failure. Having failed to meet the minimum standards set by the State for quality schools, SLPSD lost its accreditation from DESE in June 2007. Despite recently obtaining provisional accreditation, the SLPSD is still one of the poorest performing districts in the State.

In an effort to ensure that children throughout the State have access to accredited public schools, the General Assembly amended section 167.131 as part of the Outstanding Schools Act in 1993. As amended, section 167.131 reads in relevant part:

The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools . . . shall pay the tuition of and provide transportation consistent with the provisions of section 167.241, RSMo, for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.

R.S.Mo. § 167.131.1.

The statute further provides that “[s]ubject to the limitations of [section 167.131], each pupil shall be free to attend the public school of his or her choice.” R.S.Mo. § 167.131.2.

In its landmark decision in Turner v. School District of Clayton, this Court held that section 167.131 means just what it says—*i.e.*, that school-aged children residing in the unaccredited SLPSD were entitled to attend the public school of their choice in any school district in St. Louis County. 318 S.W.3d 660, 664 (Mo. banc 2010). The Court



rejected the invitation of the SLPSD and the Clayton School District (the “CSD”) to adopt a tortured reading of the statute and held instead that “Section 167.131, a straightforward and unambiguous statute, *was specifically written to apply to the factual scenario of this case.*” Id. (emphasis added).

More than two years after this Court’s decision in Turner, the County schools still refuse to enroll children pursuant to section 167.131, and children from unaccredited districts are left without access to schools that meet the State’s minimum standards. In the two years since Turner was decided the legal arguments advanced in opposition to section 167.131 have changed. Rather than accept their collective responsibility under section 167.131 to provide children with access to accredited schools, the SLPSD and CSD scrambled for new and, on their face, facile arguments to forestall the statute’s natural application and to avoid their obligation to permit SLPSD students to attend the public schools of their choice. Missouri educators have lost sight of their preeminent responsibility of educating Missouri schoolchildren. Instead, the respondent school districts squander precious resources on litigation that should be dedicated to children, in an effort to undermine the unambiguous direction of section 167.131—an irrational fear of losing turf or protecting parochial interests must yield to the will of the General Assembly.

*Amici Curiae* Ryan, Lewis, and Alexander (collectively, the “*Amici*”) are residents of the City of St. Louis and are Missouri taxpayers responsible for the education of school-aged children living in the SLPSD. As such, any one of the *Amici* could send their children to the SLPSD, and the District would be required by law to enroll them and

educate them at no charge. However, the *Amici* have no faith in the SLPSD to provide their children with an adequate education.

The *Amici* have done their best to ensure their children are properly educated. They do not trust the SLPSD, so Mr. Ryan and Mr. Alexander have enrolled their children in private schools to which they pay tuition and fees.

Ms. Lewis also distrusts the SLPSD. Each of Ms. Lewis's children has been enrolled in private school at one point and she currently pays tuition to send two of them, Nadeya and Falyn, to Marian Middle School. However, Ms. Lewis cannot send all her children to private schools and three of her five children are enrolled in SLPSD schools. Ms. Lewis is afraid that her children attending SLPSD schools will receive a poor education and she worries that attending school in an unaccredited district will leave them stigmatized after they earn their diplomas and begin to apply for colleges and look for jobs.

Unfortunately for the *Amici*'s children, and other children like them residing within the boundaries of the SLPSD, time does not stand still while the District struggles to get on track. Nor does time stand still while the SLPSD and the CSD fight a war of attrition in the courts to support an indefensible system that has thus far sacrificed generations of children. How can we tell our children to follow the rule of law when their own educators allow a continued abomination of the system? This Court has spoken and its words have been cast aside as meaningless.

During a three-day bench trial on March 5-7, 2012, in St. Louis County Circuit Court before Judge David Lee Vincent III, the SLPSD and CSD, along with several

taxpayers from the City and St. Louis County, presented evidence that purported to show that, if enforced, section 167.131 would result in chaos and pandemonium in public schools throughout the greater St. Louis metropolitan area and would violate the so-called Hancock Amendment to the Missouri Constitution. As proof, the SLPSD and CSD relied heavily on a report prepared by E. Terrence Jones, Ph.D (the “Jones Report”), which predicted that if section 167.131 is enforced as written, “approximately” 15,740 students currently residing in the SLPSD would flee and descend *en masse* upon school districts which are unprepared to accommodate them. The Jones Report forecast that 3,567 students, almost twenty-five percent of the total, would transfer to the CSD, more than doubling its current population overnight.

On May 1, 2012, Judge Vincent issued his Findings of Fact and Conclusions of Law and entered an Order and Judgment in favor of the SLPSD, the CSD, and the City and County taxpayers (collectively, the “Respondents”). In his Order and Judgment, Judge Vincent accepted and adopted the predictions of the Jones Report. Further, Judge Vincent accepted the testimony of various officials and employees from the SLPSD and the CSD stating that the student transfers predicted by the Jones Report would hopelessly cripple the SLPSD and the CSD, rendering them unable to function. Judge Vincent concluded that section 167.131 was impossible to enforce, and that it violated the Hancock Amendment to the Missouri Constitution.

On appeal by the Plaintiffs and the State of Missouri, this Court should reverse Judge Vincent’s Order and Judgment and find that section 167.131 is enforceable as written and enacted by the Missouri General Assembly. Specifically, this Court should

strongly affirm its ruling in Turner and find that section 167.131 unambiguously entitles eligible pupils from the unaccredited SLPSD to enroll in the school district of their choice in St. Louis County. This Court should further find that neither the Hancock Amendment, nor the dire prophesies of educational Armageddon contained in the Jones Report, are valid grounds upon which to excuse compliance with the law.

**I. The Trial Court's Reliance on the Jones Report Was Misplaced.**

The Jones Report, like any respectable work of dystopian fiction, has it all: a flood of refugees streaming over an unprotected border, a chaotic scramble for scarce resources, and a complete breakdown of basic institutional controls. Unfortunately, compelling fiction does not make good evidence, and the Trial Court's reliance on the doomsday scenario predicted in the Jones Report constitutes reversible error. See, e.g., School District of Kansas City v. State, 317 S.W.3d 599, 610 (Mo. banc 2010) (violation of Hancock Amendment must include "specific proof of new or increased duties and increased expenses, and these elements cannot be established by mere common sense or conjecture"). If this Court rightly rejects the conclusions of the Jones Report, then all the witnesses who relied on that report for their testimony, similarly must be rejected.

In the two years since this Court issued its decision in Turner, no SLPSD students have been permitted to enroll in any St. Louis County school district pursuant to section 167.131. Therefore, notwithstanding the Chicken Little predictions contained in the Jones Report, the effect of enforcing section 167.131 as written remains unknown. No credible evidence was submitted at trial establishing how many students now residing in

the SLPSD would enroll in County schools or which County schools those students would choose to attend.

Although there is no way to tell whether the *Amici* are representative of those parents who would enroll their children in accredited County districts if given the choice, it is worth noting that none of the *Amici* will send their children to the CSD. In fact, a district's performance, while certainly a factor in any parent's decision, often must yield to more practical considerations which are difficult to quantify, such as proximity, familiarity and the quality of after school programs. This Court should not act on an inadequate record. What Jones has provided is superficial and lacks any scholarly attributes. Judge Vincent's reliance on the Jones Report was in error.

In contrast to Respondents' preoccupation with the hypothetical, children and their families living within the boundaries of the failed SLPSD daily face a harsh reality. The Missouri Constitution requires the General Assembly to "establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law." Mo. Const. art. IX § 1(a). To fulfill its mandate, the General Assembly created a system of public schools and authorized DESE to set standards for accreditation. See R.S.Mo. §§ 160.051 and 161.092. However, in June 2007, the SLPSD was deemed an official failure under the standards set by DESE for accreditation. Today only a single point separates the SLPSD from unaccreditation, demonstrating the SLPSD's continued failure of the children and families within its boundaries.

For the *Amici* and others like them, the costs of the District's failure are not merely speculative. For parents such as Ryan and Alexander, who are able to send their children to private schools, the cost of living in the SLPSD is mainly financial and can be measured in dollars spent on tuition and fees that would otherwise be unnecessary. For parents such as Ms. Lewis, who cannot send all their children to outside schools, the cost of living in the SLPSD cannot be as easily quantified but it is substantial nevertheless. Indeed, the doomsday scenario has already arrived for those children stranded in the SLPSD and the damage being done is real. The SLPSD failures deprive a generation of children from the City of the necessary education or skills to attend college or to find a good job.

As recognized by this Court in Turner, section 167.131 "was specifically written to apply to the factual scenario of this case." Turner, 318 S.W.3d at 664. More than two years later, the County school districts refuse to follow the unambiguous directive of section 167.131 to accept students from unaccredited school districts. As Respondents have failed to meet their evidentiary burden to prove the statute should not be enforced as written, this Court should reverse the Trial Court's Order and Judgment.

## **II. Section 167.131 Does Not Violate the Hancock Amendment.**

The Hancock Amendment to the Missouri Constitution provides in relevant part that:

The state is hereby prohibited from reducing the state  
financed proportion of the costs of any existing activity or

service required of counties and other political subdivisions.

A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

Mo. Const. art. X § 21.

The Hancock Amendment is meant to protect taxpayers, and makes no pretense of protecting one level of government from another. King-Willmann v. Webster Groves School District, 361 S.W.3d 414, 416-17 (Mo. banc 2012) (citing Fort Zumwalt School District v. State, 896 S.W.2d 918, 921 (Mo. banc 1995)). Therefore, school districts have no standing to assert the Hancock Amendment as a defense to enforcement of section 167.131. Id.

When considering challenges to statutes based on the Hancock Amendment, this Court has urged caution:

A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. . . . Doubts will be resolved in favor of the constitutionality of the statute. . . . The person challenging the validity of the statute has the burden of

proving the act clearly and undoubtedly violates the constitutional limitations.

Kansas City Sch. Dist., 317 S.W.3d at 604 (internal citations and punctuation omitted).

In this case, the Trial Court found that section 167.131 violates the Hancock Amendment if enforced. The Trial Court reasoned that section 167.131 created new and increased activity for school districts beyond what was required under the previous transfer law.

In reaching its conclusion, the Trial Court accepted the predictions of the Jones Report and credited the witness who incredulously relied upon those predictions. Accordingly, the Trial Court found that section 167.131 would burden SLPSD taxpayers by forcing them to pay tuition to school districts in St. Louis County and would burden Clayton taxpayers by requiring the CSD to construct new buildings to accommodate the influx of transfer students from the SLPSD.

Contrary to the Trial Court's analysis, enforcing 167.131 as written would not violate the Hancock Amendment. As argued above, the Jones Report relied on by the Trial Court was based on speculation and conjecture and was not competent evidence. See Kansas City Sch. Dist., 317 S.W.3d at 610 (violation of Hancock Amendment cannot be shown by "mere common sense or conjecture"). The Jones Report skewed the results to show that the CSD would bear the overwhelming brunt of transfers and failed to account for the many nuances that would undoubtedly impact whether students transfer and where they enroll.



Section 167.131 does not increase the tax burden on any local taxpayers, and it does not mandate any increased activity. Indeed, the SLPSD has always had a responsibility to educate the eligible pupils residing within its boundaries. Funds follow students under section 167.131, so the statute's application results in no net increase in any activity or expense as prohibited by the Hancock Amendment. To the contrary, given that many parents, like the *Amici*, would send their children to schools that are less expensive than the SLPSD, it is manifestly plausible that transfers under section 167.131 would actually *save* taxpayers money. Even if one accepts that County districts could not absorb the wave of transfers predicted by the Jones Report without incurring substantial capital costs, it does not follow that the Hancock Amendment would bar all such transfers. Indeed, to the extent that any particular district could accommodate some students without upsetting the net burden on local taxpayers, the Hancock Amendment is not implicated. See, e.g., Brooks v. State, 128 S.W.3d 844, 848 (Mo. banc 2004).

The Hancock Amendment protects taxpayers, not the status quo or the parochial interests of school districts. King-Willmann, 361 S.W.3d at 416-17. Section 167.131 was enacted to ensure that children throughout Missouri had access to accredited public schools. As such, and as recognized by this Court in Turner, section 167.131 was written specifically to apply to the factual scenario of this case and to provide children in the SLPSD an option to enroll in the accredited school district of their choice in St. Louis County. Turner, 318 S.W.3d at 664. In order to affirm the Order and Judgment entered by the Trial Court, this Court would have to give credence to the alarmist conjectures of the Jones Report; ignore the will of the General Assembly; and, allow the damage being

done each day to children and their families living in the failed SLPSD to continue unchecked. This Court should therefore reject Respondents' arguments and reverse the Trial Court's Judgment and Order.

**III. It is Not Impossible for School Districts in St. Louis County to Comply with Section 167.131.**

The impossibility defense raised by Respondents relies entirely on the predictions from the Jones Report which wholly lacked a reliable foundation. It was wrong therefore, for the Trial Court to give credence to the parade of horrors (a mass exodus of students from the City to Clayton) envisioned by Jones in its decision.

As argued throughout this brief, the Jones Report is deeply flawed and should not be credited by this Court as competent evidence. However, even if this Court accepts the Jones Report at face value, it would not support a finding that section 167.131 would be impossible to enforce under *any* scenario.

Unlike the plaintiffs in this case, the *Amici* do not wish to send their children to school in Clayton. Rather, the *Amici* favor school districts that are less expensive than the CSD, but that appeal to them nonetheless. There is no evidence in the record that it would be impossible for Mr. Ryan to send his children to Lindbergh. Nor is there any evidence that Webster Groves could not accommodate Mr. Alexander's son, or that Rockwood or Ladue could not accommodate Ms. Lewis's children were they to enroll. Given that most accredited school districts in St. Louis County spend less on a per-pupil

basis to educate their students than the SLPSD, there is good reason to believe that many students from the City could attend County schools of their choice without triggering the type of cataclysm envisioned by the Trial Court.

In the absence of specific evidence that compliance with section 167.131 would be impossible, the Trial Court's Order and Judgment must be reversed.

### **CONCLUSION**

For all of the foregoing reasons, the Order and Judgment entered by the Circuit Court on May 1, 2012 must be reversed, and judgment must be entered in favor of Appellants.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that the Brief of Amici Curiae complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count feature on Microsoft Word, by which it was prepared, contains 4,182 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

/s/ Joshua M. Schindler

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **Brief of *Amici Curiae*** was served via the Court's electronic notification system on November 12, 2012, upon the following party of record:

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